# VIRGINIA LAW REGISTER

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**The Albemarle Bar, XV.**

In the stormy days of the Civil War, 1861-65, there were no qualifications at the Albemarle Bar. Indeed there was not a practitioner left who was not over military age, and two of those entered the service in 1864. One was Captain William T. Early, of whom we have spoken, and the other Major Benjamin Darneille, who deserves remembrance, if for no other reason than that Thomas S. Martin read law in his office and always spoke of him in the highest terms. He resided at Scottsville but practiced at the Albemarle Bar, as well as in Buckingham and Fluvanna. He was a careful, painstaking, well read lawyer, practicing mainly on the chancery side of the court. When the Reserves—men of sixty and boys of seventeen—were called out in 1864 Major Darneille was made Major of the battalion commanded by Col. R. T. W. Duke and served to the end of the war.

He removed to the City of Washington some years after the war and died there.

It was some three or four years after the Civil War before any young lawyer offered for practice at the Albemarle Bar, but in 1869 and '70 there came to the bar as remarkably fine a set of men as ever practiced law at any bar. Every one of them became subsequently warm personal friends of the writer. With them the writer had many a friendly contest; with many of them the writer was associated in more than one important case; with them he went on circuit, and recalls with keen pleasure the long rides to the county courts, the delightful nights spent in the country inns, where jokes and stories and laughter and merriment made the nights pass delightfully; with them he shared joys and sorrows, learning what sympathy meant and how joy is doubled by being shared. Coming to the bar some four or five

years later than the most of them it did not take long to make him feel as though he was a contemporary of them all. Dear friends, fond companions, noble gentlemen, splendid lawyers, upright men. It is with a clutching at the heart easy to understand that he writes their names; for today not one of them is living. The youngster who looked upon them as but a little older, is today the senior member of the bar at which they practiced. A verse from Uhland's ballad comes back to him as he writes these lines:

*"So wenn ich vergangner Tage,
Glüchlicher zu denken wage,
Muss ich stets genossen missen,
Theurer, die der Tod entrissen."

Some of them attained high place in the State and Nation; all did their duty in their day and generation. What more can man do? These men were:

Thomas S. Martin, Micajah Woods, Mason Gordon, William L. Cochran, C. D. Fishburne, Louis T. Hanckel, George Perkins, John B. Moon, A. A. Grey, Bennett Taylor, Jefferson R. Taylor, O. Reierson, Jas. B. Gilmer.

With them came older men: Angus R. Blakey, who moved from Madison where he had practiced several years; R. R. Prentis, who had been Proctor of the University; and later, W. O. Fry, who moved from Madison and entered into partnership with Mr. Blakey.

The political career of Senator Thomas S. Martin is so recent and so much a matter of public history that it would be out of place to do more than allude to it in this article. Born in Scottsville, Albemarle County, Va., July 29th, 1847, he attended private schools until March, 1864, when he entered the Virginia Military Institute, where he remained until April 9th, 1865, in the Cadet Corps. Some of this time he spent in the military service of the Confederacy with the Cadets, and was about to enter the regular Army of the Confederacy when General Lee

*"So when I to bygone days
Wistful turn my tear-dimned gaze,
Must I stand, those dear ones weeping
Death hath taken to his keeping."

surrendered. He entered the University of Virginia in October, 1865, and was in the academic department for two years.

He then read law in the office of Major Benjamin Darneille at Scottsville and commenced the practice of law at the Albemarle Bar in the fall of 1869. It was not long before he became known as a lawyer of boundless industry, ability and learning. He soon obtained a large and lucrative practice in Albemarle, Buckingham and Fluvanna. His knowledge of the statute law of Virginia was nothing short of marvellous and his friends used to tease him and say he knew the Code of 1873 by heart. But his acquaintance with the statute law was not surpassed by his knowledge of precedents and great authorities. As as advocate he was exceedingly strong. Attempting no rhetoric nor any form of ornament in his speeches, his logic, his powerful mastery of facts and marshalling of authorities compelled the attention of juries and courts alike, and he was listened to with flattering attention. His method of argument was like the blows of a sledge hammer; he knew when and where to hit, but was courteous, considerate and never "hit below the belt."

One of the greatest lawyers at the Albemarle bar once told the writer that he knew no lawyer he preferred to have associated with him, or feared more to have against him than Senator Martin.

Whilst never seeking political office until 1893, when he was elected senator, he took an active part on behalf of the Democratic Party in Virginia, and his advice, aid and counsel were much sought for by the leaders of that party. He was a member of the Board of Visitors of the Miller Manual Labor School of Albemarle County, and a member of the Board of Visitors of the University for one term. His eminent career in the Senate from 1893 to the day of his death, Nov. 12th, 1919, is a part of history. He literally wore out his life in the service of his country whilst Chairman of the Appropriations Committee of the Senate, and despite the warning of his physicians and remonstrance of his friends kept at work until the final breakdown came.

He was a most devoted son to his widowed mother, a loving brother and a warm, sincere friend. He married the beautiful Lucy Day, of Smithfield, who predeceased him, and by her he

was the father of a son, Thomas S. Martin, Jr., and of a daughter, Lucy Day Martin. A most affectionate, tender husband and father his domestic life was a beautiful one. His name will always stand high amidst the names of the great men Virginia has given to the Union.

Micajah Woods was born in the County of Albemarle May 17th, 1844, at "Holkham" the residence of his father, who was one of the most prominent agriculturists of the State. He attended private schools and in 1861 entered the University of Virginia, leaving it immediately after the outbreaking of the Civil War. He was for a short time a volunteer aide on the staff of Gen. John B. Floyd but in 1862 enlisted as a private in "The Albemarle Lighthorse" and later became a first lieutenant of artillery and served as such to the close of the war.

After the war he entered the University of Virginia, graduating in law in 1868. He at once commenced practice in Charlottesville. In 1870 he was elected Attorney for the Commonwealth for Albemarle County and was re-elected term after term, filling the office up to his death. He was a member of the Board of Visitors of the University for one term and in 1908 was elected President of the Virginia Bar Association.

As a lawyer Captain Woods was painstaking, careful, laborious and thorough. His legal papers were drawn with skill and ability. As an advocate he was a powerful man before juries and filled the position of Commonwealth's Attorney through many years with zeal, fairness and conscientious devotion to duty. A man of the kindliest nature, highest courage, strictest integrity and genial in all his relations with his fellow men, he was exceedingly popular and both his brethren of the bar and the citizens of his County loved and admired him.

He married Miss Matilda M. Morris of Hanover County and had five children, three of whom—daughters—survive him.

C. D. Fishburne was born in Waynesboro, Virginia, May 26th, 1832. He attended private schools and graduated from Washington College (now Washington and Lee University. He taught a year in Christiansburg and then entered the University of Virginia, but shortly after was elected Professor of Applied Mathematics in Davidson College, North Carolina, in which institution he was subsequently Professor of Greek. In 1860 he resigned

this professorship and entered the law school of the University of Virginia. At the outbreak of the Civil War he enlisted in that wonderful company the Rockbridge Artillery. We say wonderful, for we suppose it was the only military company in the world which maintained in its ranks a school of Greek, a school of Theology and a school of Hebrew. Mr. Fishburne served with this company about a year or so and was transferred to other departments of the army. At the close of the war he was first lieutenant in the ordnance department.

After the war he re-entered the law school of the University of Virginia and after finishing the course began the practice of the law in Charlottesville. The wrangle of the courtroom never appealed to Mr. Fishburne and whilst appearing occasionally in law cases, his main practice was on the chancery side of the court. He was one of the Commissioners in Chancery for some time and lawyers deemed themselves fortunate when one of their cases was assigned to him. His reports were clear and exact and any legal proposition involved was always decided with the utmost fairness and ability. For awhile he edited the *Charlottesville Chronicle* and those who knew him best always regretted that he had not chosen a literary career. He was a scholar and "A rare, ripe, good one" and wrote beautiful English. Probably one of the best read men of his time, his highly cultivated mind was enriched by a thorough knowledge of the ancient classics and of the finest English literature. He was in partnership for a while with A. A. Gray who later on moved to Fluvanna. He was elected cashier of the Bank of Albemarle—later on the Albemarle National Bank —and served as such to his death. He was chairman of the Board of Supervisors of Albemarle County, a member of the Council of both town and City of Charlottesville and made a most efficient officer. He was one of the trustees of Washington and Lee University, which conferred on him the honorary degree of A.M.

He died on May 16th, 1907. Few members of the Albemarle Bar had more lovable characteristics than "Clem" Fishburne, as every one knew him. His nature was essentially gentle, with an inborn courtesy and kindliness marking the perfect gentleman. He had no enemies, for he would not permit any one to be his enemy. It is said that whilst a member of the City Council, the

then Mayor, who was a splendid but very choleric man, was aggrieved at some action of Mr. Fishburne's, which did not accord with his own views and stopped speaking to him. Fishburne waited a couple of weeks and then stopped the Mayor on the street. "R———" said he, "have you too many friends?" From that time on he had no warmer friend than the Mayor.

Mr. Fishburne was twice married, his first wife dying within a year after his marriage. He married later on Miss Elizabeth Wood. She survived him many years. He left three sons by her: John W. Fishburne, the present Judge of the Judicial Circuit; George P. Fishburne, a lawyer of Seattle, and Clement D. Fishburne, Jr., of Charlottesville, Va.

Louis T. Hanckel was born in Charleston, S. C., on June 3rd, 1847. His father was the Rev. James Stuart Hanckel, D.D. In June 1863 Mr. Hanckel enlisted in the service of the Confederate States, in Company B., Ballinger's Division. He was wounded at Canlahee Ferry in January 1865, captured and held a prisoner until after the war. In 1869 his father was called to the Rectorship of Christ Episcopal Church, Charlottesville, Va., and Mr. Hanckel came with him and entered the University in the same year, studying law under John B. Minor and Stephen O. Southall. He qualified at the Albemarle Bar in 1870 and entered into partnership with Col. R. T. W. Duke, and James D. Jones under the firm name of Duke, Jones & Hanckel. This firm continued until 1875. In 1882 he and George Watts Morris formed a partnership as Hanckel & Morris, until Judge Morris became Judge of the Corporation Court of the City of Charlottesville. After that Mr. Hanckel associated with him his son Louis T. Hanckel, Jr.—a partnership which lasted until his death on July 21st, 1914. Mr. Hanckel cared very little for common law practice, devoting himself to the chancery side of the court and to fiduciary business, in which he was eminently successful. He was a man of charming manners and exceedingly popular. In connection with his law business he was a very successful insurance agent and built up probably the largest fire insurance business in the City and County, his eldest son, J. Stuart Hanckel, being his partner.

Mr. Hanckel married Miss Ida Macon, of Albemarle County, who with three sons and three daughters survives him.

**The Worm Turns. A Rebuked Juror Answers the Rebuking Judge.**

There has been a great deal of discussion about the merits and demerits of the jury system in the press lately. Much of it has grown out of a severe rebuke given by Judge Mancuso in the Court of General Sessions in New York. After one Carmichael had been acquitted of the charge of robbing two jewelry salesmen of $16,500 in jewelry, Judge Mancuso said it was hard for him to sit on the bench and receive such a disgraceful verdict, especially at a time when there are so many hold-ups in the City, and directed the Commissioner of Jurors to strike their names from the jury list.

The foreman of the jury, a Mr. Kevelson, a graduate of a law school and a man of unusual intelligence, judging from his article in reply to the Judge's criticism, comes back at the Judge and lays the verdict entirely upon Judge Mancuso's instructions. It seems to us he makes out a good case and we cannot forbear quoting his remarks.

> "It is a maxim of criminal law, and a defendant's constitutional right, that a jury shall not convict unless the defendant is proven guilty beyond a reasonable doubt. We were specifically instructed by the Judge that if there was a reasonable doubt in the minds of the jury, the defendant should have the benefit of that doubt, and the verdict should be one of acquittal.
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> "Now, there were two defendants in the case in question at the beginning. Judge Mancuso declared a mistrial in the case of one defendant, named Castrillo, because the Assistant District Attorney asked a witness if he knew that Castrillo had been convicted of a previous crime. This left George Carmichael as the only defendant, and the Judge instructed us that in weighing the evidence against him we were to exclude the signed confession of Castrillo, which implicated Carmichael.
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> "The police testified as to an alleged confession by Carmichael, which was not signed, and which he repudiated. His lawyer said a great deal about third-degree methods, but the police denied they had used such methods. The instructions of Judge Mancuso with regard to this were that if we found that the alleged confession of Carmichael was secured by force or fear of bodily injury to the defendant such confession was involuntary, and, therefore, inadmissible as evidence and we might disregard it.

"It has been claimed that we were wrong in not believing the testimony of the police. The jurors did not blame the police for the insufficiency of their testimony. We felt the police should be complimented for the good work they had done, and it was unfortunate their evidence was not sufficient. We did not attempt to condemn them for the alleged use of third degree methods, but in view of the Court's instructions were compelled to eliminate the consideration of such a confession as involuntary and inadmissible under the law.

"A strong link in the chain of evidence against Carmichael was his possession of a pair of cuff links and stick pin when apprehended three weeks after the robbery. The jury was convinced that these articles were part of the stolen property from the hold-up in question, but the Judge specifically charged that as a matter of law the mere possession of stolen property was not in itself evidence of the guilt of robbery. The jury was anxious to convict the defendant on this count, but this, the only count on which we could have convicted the defendant, the count of criminally receiving stolen property, was withdrawn from the jury by the Judge.

"Moreover, the identification of Carmichael as one of the robbers was faulty. One of the two jewelry salesmen who were held up failed to identify Carmichael, and the landlady of the furnished room house in which the robbery occurred failed to identify him. There was only a rather hazy, uncorroborated identification by one of the men who were held up, which in the estimation of the jury was not sufficient to convict Carmichael of having been in that room at that time. In the lack of a positive identification, not one juror wanted to have it on his conscience that he had sent that kid up for twenty years or more.

"It has been said that the jurors are Bolshevists and their sympathies are with criminals, but two or three members of this particular jury had themselves been robbed, and their sympathies were not likely to be with an alleged criminal. I am in the dress manufacturing business, with my father and brother, and I was robbed some time ago of about $800 worth of goods. My sister was robbed of $200 worth of goods only recently. Certainly, my sympathies would not be with an alleged criminal.

"It was also said that the men who serve on juries under the present system are of low mental calibre. That is a reflection, in this case, upon twelve representative American citizens. I have never met a more representative body of citizens than we had on this jury, each pursuing an honorable calling, and most of them business men."

Mr. Kevelson said that besides taking a law degree from New York University (in 1914), he had previously studied at C. C. N. Y. and Columbia. Prior to that he had worked in the law offices of Judge Thomas, C. T. Crain of the Court of General Sessions, and of Louis Levy of Stanchfield & Levy. He is a member of the firm of Kevelson & Sons, makers of girls' dresses, 14-18 East Thirty-second Street, and lives at 745 Riverside Drive. He belongs to the Merchants' Association and the Associated Dress Industries.

> "With regard to Judge Mancuso's remarks," Mr. Kevelson said, "I think we have a right to demand a public retraction, and I intend to call the jurors together and take up the matter with the Merchants' Association. His rebuke was a gross injustice to twelve representative citizens, and his persistent refusal to listen to my attempts to explain our verdict, was contrary to the spirit of fair play."

We rather think Mr. Kevelson makes out a good case and the Judge ought to apologize.

Our old friend "reasonable doubt" and his near relative in regard to the possession of stolen property are responsible for many miscarriages of justice. The judge ought in all cases to give the jury a clear definition of what a reasonable doubt is, and should always emphasize the "unexplained" possession of property recently stolen. The difficulty with most judges is that they, very naturally, think the jury has knowledge of the force and effect of an instruction from the legal standpoint; whereas the jury is too apt to take them literally.

Judge Mancuso is not the only New York judge having trouble with juries. Judge Talley of the Court of General Sessions denounced a jury for acquitting one Albano, who was a confederate of one Perciacanto who had been convicted the day before. Judge Tierney in the Bronx Supreme Court, also rebuked a jury for bringing in a verdict for one thousand dollars damages for the death of a boy killed in a collision. He said he would set the verdict aside, but allowed argument on the point.

Justice Gannon of the Supreme Court of Brooklyn criticized his fellow judges quite severely in defending the jury system in his address to the talesmen in his court.

Of course Mr. William H. Anderson, State Superintendent

of the Anti-Saloon League, had to have his say, writing to Judge Talley and complimenting him upon establishing the wholesome precedent of summary dealing with a jury which has obviously violated its oath.

> "I desire respectfully to submit for your consideration," Mr. Anderson went on, "whether such prompt action in this direction by the judges charged with the administration of the prohibition law would not have done much to prevent the existing situation; and whether such a course even now in such cases will not hasten the correction of the evil."

With all due respect to Mr. Anderson we very much doubt if "summary dealing with a jury" will accomplish anything. "Hard words break no bones" is the old adage and all that a judge can do is to use hard words and direct names to be taken out of the jury list—the latter proceeding not being regarded as punishment by very many men. The fact is nothing can be done but to select the best possible men for jury service and have *no exemptions,* leaving necessary exemptions to the judge. To threaten, to attempt to terrorize, juries is an evil so dangerous to the liberty of the people that every lover of human rights and liberty should frown upon it. Those who have read of the attempts of the English judges to coerce juries in libel suits will feel a just pride in the courage of the brave men who withstood that judicial tyranny. All men who think coolly, who are well-wishers of their country, will pray God to avert from us such a calamity as juries coerced into verdicts of which their consciences do not approve or who stand in terror of judges or populaces. That juries go wrong often is true; that they occasionally render verdicts shocking to many of us, is a fact. But we must remember juries are but mortals, and after an experience of practice now verging dangerously to the half century mark the writer says in all seriousness that in the vast majority of cases the juries err about as seldom as the courts. They have strange ways often of arriving at results, but generally arrive at just conclusions and we believe are always honest, even when in error. Let us beware of tampering with a system which has proven one of the bulwarks of human liberty.

Since the foregoing article was written the controversy between juries and the courts seems to be catching in New York. In the Eno will case before Surrogate Foley, at the first trial of this

case the will was held invalid and a new trial was granted, and at the second trial of the case the same result was reached—the will was declared invalid. The judge complimented the jury in discharging them, and subsequently, in setting their verdict aside, reflected rather seriously upon the jury, stating "that they were easily influenced by sympathy or prejudice and materially affected by extraneous arguments," and further expressed the opinion that "juries in general were unfit to sit in will cases, it being extremely difficult for juries to comprehend and apply the tests laid down for the determination of probate issues." The jury came back in a long letter which we will not quote, but stating their view of the judges's instructions and we think rather getting a little the best of the court; but we thoroughly agree with one of the counsel in the case, a Mr. Steuer, who says

> "I think the action of the jurymen is in bad taste, and I am sorry that they have taken this course. I think these controversies which have been occurring recently between Judges and jurymen are most unfortunate. If they continue, they will result in one of two ways. Either the jurymen will lose their independence and allow the Judges to usurp their functions; or hostility between Judges and jurymen will increase and greatly impair the administration of justice.
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> "I deplore the tendency of many judges to enter the province of jurors and constitute themselves judges of the facts. Jurors nearly always render correct verdicts. Their judgment on the facts is infinitely better than that of a judge. The mind of the judge is usually given over to the consideration of points of law, while the jurymen study the facts and arrive at a just judgment on them. You see judges frequently undertaking to pass on facts of business transactions when, because of their training, twenty-nine out of thirty of them would go bankrupt if they attempted to enter into business themselves."

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**Standard Time—Fraction of a Day.**

We were always of the opinion that the rule was universal that the law recognized no fraction of a day and that the courts did not hold themselves bound to observe any hour of the day as making a finality. But New Jersey—which, by the way, is said to be out of the Union—does not adhere to that rule. A case actually went up to the Supreme Court and was reversed

under the following circumstances: A daylight saving ordinance had been passed by the town of Bridgeton. Minch Brothers were summoned to appear in court at 10 A.M., daylight saving time. They came at 10 A.M., standard time, and found judgment entered against them. Why the court did not at once set aside the judgment is a mystery to us. But it refused to do so and Minch Brothers appealed. The Supreme Court, in reversing the judgment held that a city or town had no right to change the hours for holding court, as the statute regulating these things fixed standard time for all court sessions.

We wonder what the court would have done with old Judge Thompson's ruling in Louisa. He ordered the court to be adjourned until 2 P.M. When that hour came the sheriff went in and rang the court house bell vigorously. About two thirty the judge came in and after having court opened, enquired with some asperity who rang the bell. "I did, please your Honor," said the sheriff. "Your Honor adjourned court until two o'clock and it was two when I rang." "Mr. Clerk," said the old Judge in his most severe manner, "fine the sheriff five dollars for contempt. My watch regulates the time in this court."

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**A Judge against the Judges —Mr. Root's View.**

In the August number of the REGISTER, Vol. 7, N. S., p. 292 we referred to the action of Mr. Justice Ford, one of the Supreme Court Justices of New York, in seeking an injunction restraining the Appellate Division Justices from continuing their failure to assign him to sit in Special Term of the Supreme Court in regular rotation with the other Justices, charging discrimination. The case was transferred to Brooklyn to relieve the Appellate Division in Manhattan, in case of an appeal, from reviewing its own acts.

Elihu Root appeared last month before Justice Russell Benedict in the Supreme Court in Brooklyn and asked that the action brought by Justice Ford be dismissed.

"The gravamen of this complaint," argued Mr. Root, "is that the complaining justice has acquired the right to perform all duties of the Supreme Court equally with every other justice, and he contends that it is abuse of discretion for the justices of the

Appellate Division to consider his capacity and adaptability. Can it be said that the right of the justice to share in the work that he seeks to do is paramount to the public business? No. This complaining justice says that the Appellate Division shall not regard the necessities and requirements of public service as of equal importance with his dignity as an elected justice of the Supreme Court. And yet this same justice was elected under a constitution which provides that the Governor shall choose from among all the Justices of the Supreme Court those who are to sit in the Appellate Division. Will the plaintiff assert that his election to the Supreme Court gives him the right to sit in the Appellate division? Public office is not property. Duties are assigned for the public good. And there are those of us who still care for the perpetuation of our institutions who hold that public duty is paramount to private advantage. This complaining Justice here asks this Court to hold that his office is primarily for his own advantage and that it is error for this great court of which he complains to consider the public benefit."

"Besides," added Mr. Root, "Justice Ford's contention, if upheld, would violate the principles on which the courts divide authority and the exercise of their several functions. One Judge does not sit in judgment on another and one branch of the court does not sit in judgment upon another branch except through the legally prescribed methods of appeal."

Mr. Root closed by saying that the Appellate Division tried to assign the Justices after consideration of their respective abilities. Some men, he said, are better fitted for trial work and some are better fitted to sit in special terms. The work, he said, was distributed with an eye to giving to everybody the work that he was best fitted for, with a view to having the work, as a whole, done in the best possible manner.